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No. 84-349

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ELLEN GIBNEY, *et al.*,

Appellants,

-v-

TOLEDO FEDERATION OF TEACHERS, *et al.*,

Appellees.

On Appeal From the Court of Appeals of Ohio, Sixth Appellate District

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OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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OPPOSITION TO MOTION TO DISMISS OR AFFIRM

I. THE CONTROVERSY BETWEEN THE TOLEDO FEDERATION OF TEACHERS AND THE PETITIONERS IS NOT MOOT.

The Toledo Federation of Teachers (TFT) argues that the case is moot because Ohio's new collective bargaining statute, effective April 1, 1984, was not drawn in question or tested in the courts below. That argument indicates a lack of understanding of the test for mootness. A case is not moot "as long as the parties have a concrete interest, however small, in the outcome of the litigation." *Ellis v. Railway Clerks*, ____ U.S. ____, 104 S. Ct. 1883, 1889 (1984); *see Powell v. McCormack*, 395 U.S. 486, 496 (1969). The issues in this case concern the costs incurred by TFT in school year 1982-83 for activities for which the Petitioners can be forced to pay. The new Ohio statute did not settle the controversy concerning

the amount owed. Concrete legal issues remain to be decided and, therefore, the case is not moot. *See United Public Workers v. Mitchell*, 330 U.S. 75, 89 (1947).

TFT also argues that the case is moot because of its new internal rebate procedure. But, one of the "live" issues in this case is whether the Petitioners can be forced to resort to their adversary as a prerequisite to obtaining a judicial determination of their rights. Surely, that question is not settled by TFT's creation of such a remedy. *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), and *Ellis, supra*, make it clear that questions concerning the permissible amount of agency-shop fees are justiciable questions which should be resolved in a judicial forum. *See McDonald v. City of West Branch*, ____ U.S. ____, 104 S. Ct. 1799 (1984); *Patsy v. Florida Board of Regents*, 457 U.S. 496 (1982). Also since Petitioners will never be satisfied with or accept TFT's determination of the amount due to it, the existence of the internal rebate procedure does not settle the controversy and the case is not moot for that reason as well.

In addition, the new procedure is not a part of the record. As described in TFT's motion, however, it appears to be woefully inadequate because it provides for an escrow of only the amounts TFT estimates it will spend for political and ideological purposes unrelated to collective bargaining and it does not provide for a reduction of future fees. Since the entire fee is not placed in the escrow account, the new system is not "a procedure which will avoid the risk that [Petitioner's] funds will be used, even temporarily, to finance ideological activities unrelated to collective bargaining." *Abood*, 431 U.S. at 244 (Stevens, J., concurring); *and see Hudson v.*

Chicago Teachers Union, ____ F.2d ____, 117 L.R.R.M. 2314, 2320-21 (7th Cir. 1984).

II. THE FEDERAL QUESTION PRESENTED BY THIS APPEAL IS SUBSTANTIAL.

The opinion below affirms a judgment against the Petitioners for a fee equal to union dues and it requires the Petitioners to utilize TFT's internal rebate procedure as a prerequisite to a judicial determination of the amount TFT spends for non-collective bargaining purposes. The opinion places no restriction whatsoever on the uses to which TFT may put the money after the judgment is paid.

This interpretation of the Ohio statutes involved, O.R.C. §§ 3313.17, 3313.20, 3313.33, 3313.47, and 3319.08, is substantively the same as the statutory interpretation before the Court in the *Abood* case and it raises the same issues. While the Ohio Court of Appeals cited *Abood*, it did not follow the holding in that case. Rather, it opted for a method that causes the constitutional injury which *Abood* sought to prevent. The Court of Appeals affirmed a judgment for a fee equal to dues without permitting the Petitioners to litigate whether that amount included amounts which had been spent for political and ideological purposes. And the judgment required the Petitioners to utilize TFT's internal procedures as a prerequisite to a judicial determination of the amount of their liability. The refusal to permit the litigation of defenses going to the amount of liability is contrary to this Court's holding in *Abood*, 431 U.S. at 241-42. The requirement to utilize TFT's internal rebate

procedure is contrary to this Court's holding in *Ellis*, 104 S. Ct. at 1890.

TFT is correct when it states at pages 9 and 10 of its motion that the Petitioners have paid the judgment against them and have received a rebate in an amount solely determined by TFT. Also, as required by the judgment of the Court of Appeals, they are in the process of exhausting TFT's appeal procedure in order to comply with the judgment's prerequisite for judicial relief. All of which substantiates Petitioners' claim that TFT was not entitled to summary judgment in the first place and reinforces their claim of current constitutional injury caused by the failure of the Ohio Court of Appeals to follow *Abood, supra*, and to anticipate the result in *Ellis, supra.*

This case differs from *Jibson v. White Cloud Education Association*, No. 83-1816, 53 U.S.L.W. 3268 (U.S. October 9, 1984), and *Kempner v. Local 2077, State, County and Municipal Employees*, No. 84-361, 53 U.S.L.W. ____ (U.S. October 29, 1984), because it involves a money judgment against the Petitioners for a fee in excess of that to which TFT constitutionally is entitled and the Petitioners tried to, but were prevented from, raising constitutional defenses in the trial leading up to that judgment. Therefore, this case raises the same constitutional questions that were present in *Abood* and they are just as substantial now as they were then.

CONCLUSION

For the reasons stated here and in the jurisdictional statement, the Court should summarily reverse the deci-

sion below and declare the Ohio agency-shop statutes unconstitutional as applied. Further, the Court should remand the case with directions which require TFT to prove the amount of its entitlement before any judgment is awarded and which permit the teachers to conduct discovery and litigate the issues raised by their defenses and counterclaim. In the alternative, the Court should note probable jurisdiction of the appeal and set it down for plenary briefing and argument.

Respectfully submitted,

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